VICARIOUS LIABILITY FOR TORTS OF DOCTORS

Rosensweig v. State,

5 N.Y.2d 404, 158 N.E.2d 229 (1959)

George Flores, a professional boxer, died as a result of injuries received during a match on August 29, 1951. Boxing is prohibited in New York unless the participants are licensed by the State Athletic Commission. As a prerequisite to securing a license each fighter must be examined by a doctor chosen from a panel of physicians established by the Athletic Commission, the doctor being paid by the promoters. The administrator of the Flores estate brought a wrongful death action against the state for the negligence of the examining physician, contending that the doctor was a servant of the state. The court, in a 4-3 decision, held that there was no master and servant relationship between the state and the doctor. The minority would have held the state liable under the doctrine of respondeat superior.

The theory of the plaintiff's claim was that the state, by its regulation of boxing, exercises a sufficient right of control over the examining physicians to justify the imputation of their torts. The court rejected this contention by holding that the Walker Boxing Law[1] and the rules of the Athletic Commission do not constitute the examining doctors servants of the state or subject to the right of control of the Commission in performing their duties.

Generally, a servant is defined as one who is "employed to perform services in the affairs of another and who with respect to the physical conduct in performance of the service is subject to the other's control or right to control."[2] That a servant's torts may be imputed to his master is a proposition which is no longer questioned; therefore, the crucial question when seeking to establish a master-servant relationship is whether or not a sufficient right of control exists. Ordinarily the courts experience no difficulty in holding a common laborer to be a servant; however, most litigation involves more subtle distinctions, such as the relationship between a physician and his purported master. Until recently, most jurisdictions have considered doctors sufficiently free of all right of control to be independent contractors.[3] As such, their employers were not subject to vicarious tort liability. The basis for this is that a doctor's high degree of training and skill in his field necessarily requires that he exercise discretion in the manner of performance of his duties. It follows that because of this discretion, a physician is not ordinarily subject to the control of his employer to an extent sufficient to justify the imputation of his torts.

However, the courts have recently shown a tendency to hold em-

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[1] N.Y. SESS. LAWS 1952, ch. 666, p. 1434.

[2] RESTATEMENT, AGENCY 2d § 220 (1) (1957).

[3] Pearl v. West End Street R.R., 176 Mass. 177, 57 N.E. 339 (1900); Moore v. Lee, 109 Tex. 391, 211 S.W. 214 (1919); see Annot., 19 A.L.R. 1183 (1922).

ployers of doctors liable for their negligence. The *Restatement of Agency, 2d*, takes the view that,

> . . . while the physician employed by a hospital to conduct operations is not, in the normal case, a servant of the hospital, yet it may be found that the house physician or the internes, if subject to directions as to the manner in which their work is performed, are servants of the hospital while in performance of their duties.[4]

At least five states[5] have enther partially or entirely repudiated the doctrine that a doctor can never be considered a servant, and furthermore, the federal courts have included physicians within the meaning of the term "employees" in the Federal Employers Liability Act and have recognized the imputation of their torts.[6] Considering these factors, there appears to be a trend throughout the United States toward the proposition that a doctor's status will be determined according to the particular facts of each case rather than by any arbitrary classification based solely on his profession.

While New York courts will impute physician's torts when the right of control test is satisfied, the facts in the *Rosensweig* case did not convince the court that the test had been met. Their interpretation of the boxing legislation led them to the conclusion that even though the state exercises a limited power of supervision over the physical examinations, this is only an exercise of the police power of the state, and does not create a relationship which will justify tort imputation.

The noted case involves a tort action against the state, and since Ohio has not waived its sovereign immunity, a similar suit could not be maintained in Ohio.[7] However, an action against a private individual or corporation employing a doctor would entail the same issue as that in the instant case, *i. e.*, the imputation of a physician's tort. This question is of special significance to Ohio hospitals because (1) charitable hospitals are no longer immune from suit,[8] and (2) they employ doctors. Although Ohio case law on this point is sparse, a recent court of appeals case, *Andrews v. Youngstown Osteopathic Hospital Ass'n*,[9] held that the negligence of an interne could be imputed to the hospital which employed

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[4] § 223, comment *a* (1959).

[5] McGuigan v. Southern Pacific R.R., 129 Cal.App.2d 482, 277 P.2d 444 (Dist. Ct. App. 1954); Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952); Knox v. Ingalls Shipbuilding Corp, 158 F.2d 973 (5th Cir. 1947) (Mississippi); Bing v. Thung, 2 N.Y.2d 656, 143 N.E.2d 3 (1957); Treptau v. Behrens Spa, Inc., 247 Wis. 438, 20 N.W.2d 108 (1945).

[6] *E.g.* Dunn v. Conemaugh and Black Lick R.R., 162 F.Supp. 324 (W.D.Pa. 1958); O'Donnell v. Pa. R.R., 122 F.Supp. 899 (S.D.N.Y. 1954).

[7] Wolf v. Ohio State University Hospital, 170 Ohio St. 49, (1959).

[8] Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

[9] 77 Ohio L.Abs. 35, 147 N.E.2d 645 (Ct.App. 1956), *appeal dismissed* 166 Ohio St. 228, 140 N.E.2d 900 (1957). See also, N.Y.C.R.R. v. Wiler, 124 Ohio St. 118, 177 N.E. 205 (1931).

him. The reasoning of the court was that when the employer has the right to control the acts of an employee, it is the employer's duty to exercise that right to prevent negligent injury to others.[10]

Thus, it is likely that in the near future the Ohio courts will be called upon to decide whether or not to impute to a hospital the torts of its professional personnel. To meet the right of control test in such a situation, the amount of evidence the plaintiff must present to satisfy this burden will depend upon the status of the tortfeasor. Certainly further evidence of right of control by the hospital-employer will be required when the tortfeasor is a doctor than in cases where there is an absence of discretion in the tortfeasor. Therefore, in most cases, the torts of internes and nurses are more likely to be imputed to hospitals than the torts of physicians.

Paul J. Stergios

[10] *Id.* at 37, 147 N.E.2d at 647.